IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.6.2007

CORAM:

THE HONOURABLE MR.JUSTICE C.NAGAPPAN

Second Appeal No. 1420 of 1991

1. Kaliannan
2. Palanisamy .. Appellants

-Vs-

1.Balakrishnan (died)
2. Elangovan .. Respondents
[R2 is brought on record as LR of the
deceased sole respondent vide
Order dated 21.4.2003 made in
CMP No.4174 of 2000]

Second appeal is filed against the judgment and decree, dated 28.6.1991, made in A.S.No.81 of 1989 on the file of learned Subordinate Judge, Gobichettipalayam reversing the judgment and decree dated 28.7.1989 passed in O.S.No. 161 of 1987 on the file of Additional District Munsif, Gobichettipalayam.

For appellants : Mr.S.V.Jayaraman
Senior Counsel for
Mr. P.V.Ramachandran

For respondents : No appearance

JUDGMENT

This second appeal is preferred against the judgment and decree dated 28.6.1991 made in A.S.No. 81 of 1989 on the file of the Subordinate Judge, Gobichettipalayam, reversing the judgment and decree dated 28.7.1989 passed in O.S.No. 161 of 1987 on the file of the Additional District Munsif, Gobichettipalayam. The plaintiffs are the appellants. Pending the second appeal, the sole respondent died and his Legal Representative has been impleaded as second respondent.

2. The plaintiffs filed the suit seeking for declaration of their title to the suit properties and for permanent injunction restraining the defendant from interfering with their possession and enjoyment of the suit properties.

3. The case of the plaintiffs is that the defendant and one Muthusamy are the sons of Palani Naicker and they divided the family properties among themselves by means of a registered Partition Deed dated 25.11.1961 in which 'A' schedule property, which is given as Item I in the suit schedule, was allotted to Palani Naicker and 'B' Schedule property was allotted to Muthusamy and 'C' schedule was allotted to the defendant and Item II in the suit properties is the western half of 'B' Schedule property. It is further stated by the plaintiffs that subsequent to the partition, father Palani Naicker purchased 'B' Schedule property from his son Muthusamy and executed a registered settlement deed dated 21.1.1987 in favour of the plaintiffs regarding the suit properties and put them in possession of the same and the settlement covers entire 'A' schedule property of Palani Naicker and the western 0.71 cents of 'B' Schedule property purchased by him from his son Muthusamy. The plaintiffs have further stated that regarding other eastern portion of 'B' Schedule property, father Palani Naicker executed a settlement deed in favour of sons of Muthusamy on 17.10.1963. According to them, they have become absolute owners of the suit properties as per the settlement deed dated 21.1.1987 and they are in possession of the suit properties in their own right by paying kist and the defendant has no manner of right over the suit properties and since the defendant is attempting to interfere with the possession of the plaintiffs, the suit is filed.

4. The defendant filed the written statement stating that father Palani Naicker and his two sons divided the family properties by partition deed dated 25.11.1961 and 'A' schedule property was allotted to the share of Palani Naicker and he also purchased 'B' Schedule property from his son Muthusamy and executed a settlement deed with regard to eastern portion of 'B' Schedule property in favour of the sons Muthusamy. According to the defendant, Palani Naicker was not in enjoyment of Items I and II of the suit properties and the defendant alone was enjoying the properties along with his share. It is further stated in the written statement that Palani Naicker was an illiterate and in order to grab the suit properties, he was taken to Pariyur Festival during December, 1986, and there, the plaintiffs' parents cheated him and obtained the alleged settlement deed dated 21.1.1987 by coercion and it was not acted upon and it did not come into force and the plaintiffs cannot claim any right or title based on it in the suit properties and the claim of the plaintiffs that they are in possession and enjoyment of the suit properties is false. It is further stated by the defendant that father Palani Naicker executed a cancellation deed dated 19.2.1988 cancelling the settlement deed dated 21.1.1987 and thereafter he executed another settlement deed on 23.2.1988 settling the properties in favour of the minor son of the defendant and hence, the suit is liable to be dismissed.

5. The Trial Court, on a consideration of oral and documentary evidence, held that the settlement deed dated 21.1.1987 is true, valid and acted upon and the plaintiffs are in enjoyment of the suit properties and they are entitled for the reliefs sought for in the suit and decreed the suit as prayed for. Aggrieved by the same, the defendant preferred appeal and the appellate Court held that the settlement deed dated 21.1.1987 is true, but, it was not acted upon and never came into force and the plaintiffs cannot claim any title based on it and allowed the appeal dismissing the suit. Challenging the same, the plaintiffs have preferred the present second appeal. For the sake of convenience, in this Judgment, the parties are referred to as arrayed in the suit.

6. The following substantial questions of law are framed for consideration:
(1) Whether the learned subordinate Judge is correct in law to hold that the document is not acted upon in law when the settlor admits that patta transfer in favour of the plaintiffs have been applied for and particularly when he was living with them for nearly a year?
(2) Has not the learned subordinate Judge exceeded his jurisdiction in holding that even though the settlement is valid it was not acted upon contrary to the document and unless the document is set aside by a proper proceeding in a Court of law by the settlor?

7. The second respondent, who was impleaded as Legal Representative of the first respondent, has

not chosen to appear and his name is printed in the cause list.

8. Mr. S.V.Jayaraman, learned senior counsel appearing for the appellants, submits that the lower appellate Court has erred in law in holding that the Settlement Deed dated 21.1.1987 was not acted upon when the document itself recites that possession has been handed over and when the settlor himself by his own affidavit filed in the suit has stated that the suit properties are covered by the Settlement Deed dated 21.1.1987 and the plaintiffs are in enjoyment of the suit properties and hence, the finding is erroneous and liable to be set aside. The learned senior counsel also submits that handing over of the original settlement deed to the settlee is sufficient evidence for the acceptance of the gift and a presumption arises that the possession has been handed over to the donee and in support of his contention, he relies on a Division bench judgment of this Court in KAMAKSHI AMMAL vs. RAJALKSHMI & OTHERS reported in [(1995-I) CTC 372]. The Division Bench, following the Privy council decision reported in AIR 1927 PC 42 [KALYANASUNDARAM PILLAI v. KARUPPA MOOPPANAR], held that the fact of the gift deed being handed over by the donor to the donee was sufficient evidence of his having accepted the gift.

9. Ex.A.2 is the Settlement Deed, dated 21.1.1987, whereby the settlor Palani Naicker has settled the suit properties in favour of his maternal grandsons, namely, the plaintiffs. It is not in dispute that Palani Naicker and his two sons divided the family properties by means of Ex.B.7 original registered partition deed dated 25.11.1961 and 'A' schedule property therein, which is shown as Item I of schedule in the suit, was allotted to the share of Palani Naicker and 'B' Schedule property was allotted to his son Muthusamy and Palani Naicker purchased 'B' Schedule property from his son Muthusamy under Ex.A.10 Sale deed dated 3.9.1963. From the above, it is clear that the settlor Palani Naicker was the absolute owner of the suit properties, which he settled under Ex.A.2 Settlement Deed in favour of the plaintiffs. It is also admitted that Palani Naicker settled the eastern portion of 'B' Schedule property in favour of his grandsons, namely, sons of Muthusamy, by Ex.A.3 Settlement Deed dated 17.10.1963. In the written statement, the defendant has stated that the parents of the plaintiffs have cheated Palani Naicker and obtained Ex.A.2 Settlement Deed by coercion. The defendant has examined himself as D.W.1 and has spoken to about the same. The settlor, who was examined as D.W.2, has only stated that his signature was obtained on blank papers and later, Ex.A.2 has been created. This contention cannot be true for the reason that the settlor in his Ex.B.6 cancellation deed, purporting to cancel the Settlement Deed dated 21.1.1987, has only stated that the settlees, namely, the plaintiffs, expressed their unwillingness to cultivate the land dealt with under the settlement deed and hence, he is cancelling the earlier settlement deed. If really the Settlement Deed dated 21.1.1987 was obtained by cheating and coercion, the settlor ought to have said so in the cancellation deed and it was not stated so. For the first time, while defending the suit, such a contention has been raised and that cannot be true.

10. The other contention raised by the defendant is that Ex.B.2 Settlement Deed was not acted upon and the plaintiffs are not in enjoyment of the suit properties. The first plaintiff has examined himself as P.W.1 and has marked Ex.A.9 Kist receipt dated 4.4.1987, evidencing the payment of Kist in his name for the suit properties. Ex.A.2 recites that possession has been handed over to the settlees on the date of settlement deed itself and the settlor himself in his third party affidavit dated 23.4.1987 filed in the suit has stated that he executed the settlement deed dated 21.1.1987 and also handed over possession of the properties dealt with therein to the plaintiffs and they are in enjoyment of the properties. Moreover, Ex.A.2 settlement deed recites that the settlor has also handed over signed Patta Transfer application for the properties in favour of the settlees and the settlor in Ex.B.6 Cancellation Deed has stated that the plaintiffs have applied for change of patta in their names and the same is pending. The above clearly shows that Ex.A.2 settlement deed has been acted upon and the plaintiffs are in possession of the suit properties in their own right. The plaintiffs have shown by adducing oral and documentary evidence that Ex.A.2 settlement deed is true, valid and acted upon

and the finding of the lower appellate Court that Ex.A.2 settlement deed though valid, has not been acted upon, is perverse and liable to be set aside. The substantial questions of law are answered in favour of the appellants.

11. The second appeal is allowed and the judgment and decree of the lower appellate Court are set aside and the suit is decreed as prayed for with costs throughout. Consequently, CMP No.6988 of 1992 is closed.

pb.

To

1. The Addl. District Munsif,
Gobichettipalayam.

2. The Sub Judge,
Gobichettipalayam.

3. V.R. Section, High Court,
Madras.